

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 JOHN PAUL NELSON III; CECILIA
4 CLAIRE NELSON; and KING COUNTY,

5 *Petitioners,*

6 v.

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,

9 *Respondent.*

SHB NO. 06-014

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

10 **[1]**

11 This case is an appeal of the Department of Ecology's denial of a Shoreline Variance
12 Permit for the construction of a second story addition to an existing garage within the required 50
13 foot shoreline conservancy setback on Vashon Island. John Paul Nelson III and Cecilia Claire
14 Nelson have appeared *pro se*. Assistant Attorney General Thomas J. Young represented the
15 Department of Ecology. King County informed the Board that it did not intend to actively
16 participate in the appeal. Board member Kathleen Mix presided, joined by members Andrea
17 McNamara Doyle and Mary Alyce Burleigh. The Department of Ecology filed a Motion for
18 Summary Judgment, asserting that there are no material facts in dispute and that the proposed
19 addition to the garage does not meet the shoreline variance review criteria. The Board
20 considered the motion based solely on the written record, which consisted of the following:

21 ORDER GRANTING
SUMMARY JUDGMENT
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1. Department of Ecology's Motion for Summary Judgment and Memorandum in Support thereof.
2. Declaration of David Pater, with attachments A through F.
3. Appellant's Response to Ecology's Memorandum in Support of Motion for Summary Judgment.
4. Declaration of Cecilia Nelson, with attachments A through J.
5. Appellants' Supplemental Response to Ecology's Motion for Summary Judgment.
6. Department of Ecology's Reply to Petitioners' Response.
7. Second Declaration David Pater, with attachment A (various photos).

[2]

BACKGROUND

Petitioners own waterfront property located at 10821 Point Vashon Drive S.W. on Vashon Island, Washington. The property is designated a conservancy area under the King County Shoreline Management Master Program. *Pater Declaration*. Within the conservancy area, King County requires a 50 foot setback from the shoreline for all structures, and development of accessory structures such as garages is limited by both square footage and height restrictions. *King County Code 25.24.030H; .090B; 25.16.110*.

The property currently contains a single family residence and a 1,500 square foot, detached four-car garage that is set back 18 feet from the ordinary high water mark (OHWM). Residential and other structures on the property are built on a narrow, flat strip of shoreline between Puget Sound and a ridge of steep slopes.

1 On June 16, 2005, petitioners filed an application for a shoreline variance permit with
2 King County. Petitioners proposed to construct a second story garage addition over the existing
3 garage footprint within the required 50 foot shoreline conservancy setback. The finished height
4 of the garage would be approximately 24 feet from the existing grade. The proposed second
5 story addition to the garage is to serve as storage for various corvette (car) memorabilia
6 accumulated by petitioners over a long period of time. Petitioners collect the corvette
7 memorabilia as a hobby, as well as for investment purposes for their retirement. *Appellant's*
8 *Supplemental Response*.

9 On January 13, 2006 King County approved the variance request. *Pater Declaration,*
10 *Exhibits A, B, C, D.* Ecology denied the variance permit on March 23, 2006, concluding the
11 application did not meet the shoreline variance review criteria of WAC 173-27-170. *Pater*
12 *Declaration, Exhibit D.*

13 [3]

14 **LEGAL ISSUES**

15 The issues before the Board in this motion were identified in the Pre-Hearing Order and
16 the Motion as follows:

- 17 1. Does the proposed project meet the shoreline variance criteria of WAC 173-
18 27-170, and comply with the Shoreline Management Act (RCW 90.58) and the
19 Shoreline Master Program?

- 1 2. Did the Department of Ecology’s reversal of King County’s Shoreline
2 Variance permit issued on January 6, 2006 violate precedential procedures, in
3 light of past decisions and permits issued?
4 3. Is the denial of the variance by the Department of Ecology equitable and fair
5 and consistent with other decisions on Vashon Island?
6 4. Should the Department of Ecology’s March 23, 2006 reversal of the King
7 County Shoreline Variance permit approval be overturned?

8 **ANALYSIS**

9 **[4]**

10 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
11 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
12 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary
13 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
14 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
15 and neither party contests the facts relevant to a legal determination. *Rainier Nat’l Bank v.*
16 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d
17 1004 (1991).

18 The party moving for summary judgment must show there are no genuine issues of
19 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
20 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
21 summary judgment proceeding is one that will affect the outcome under the governing law.

1 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
2 and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate*
3 *Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to
4 the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*,
5 120 Wn2d 357,365, 842 P.2d 470 (1992).

6 [5]

7 WAC 173-27-170 sets forth the criteria that an applicant must meet in order to
8 demonstrate they are entitled to a variance, as follows:

9 The purpose of a variance permit is strictly limited to granting relief from specific bulk,
10 dimensional or performance standards set forth in the applicable master program where
11 there are extraordinary circumstances relating to the physical character or configuration
of property such that the strict implementation of the master program will impose
unnecessary hardships on the applicant or thwart the policies set forth in [RCW 90.58.020](#).

12 (1) Variance permits should be granted in circumstances where denial of the permit
13 would result in a thwarting of the policy enumerated in [RCW 90.58.020](#). In all instances
the applicant must demonstrate that extraordinary circumstances shall be shown and the
14 public interest shall suffer no substantial detrimental effect.

15 (2) Variance permits for development and/or uses that will be located landward of the
ordinary high water mark (OHWM), as defined in [RCW 90.58.030 \(2\)\(b\)](#), and/or
16 landward of any wetland as defined in [RCW 90.58.030 \(2\)\(h\)](#), may be authorized
provided the applicant can demonstrate all of the following:

- 17 (a) That the strict application of the bulk, dimensional or performance
18 standards set forth in the applicable master program precludes, or
significantly interferes with, reasonable use of the property;
- 19 (b) That the hardship described in (a) of this subsection is specifically related
20 to the property, and is the result of unique conditions such as irregular lot
shape, size, or natural features and the application of the master program,
21 and not, for example, from deed restrictions or the applicant's own actions;

- 1 (c) That the design of the project is compatible with other authorized uses
2 within the area and with uses planned for the area under the
3 comprehensive plan and shoreline master program and will not cause
4 adverse impacts to the shoreline environment;
- 5 (d) That the variance will not constitute a grant of special privilege not
6 enjoyed by the other properties in the area;
- 7 (e) That the variance requested is the minimum necessary to afford relief; and
- 8 (f) That the public interest will suffer no substantial detrimental effect.

9 [6]

10 Variances are, in effect, exemptions from the statutory and regulatory requirements
11 enacted to preserve the natural resources of the state. As such, they are to be narrowly construed
12 in order to give maximum effect to the policy underlying the general rule. *D&S Ventures v.*
13 *Ecology*, SHB No. 05-031, CL 8 (2006). Variances shall be allowed “only if extraordinary
14 circumstances are shown and the public interest suffers no substantial detrimental effect.”
15 *Garrett v. Department of Ecology*, SHB Nos. 03-031 and 03-032; *D&S Ventures*, citing *Buechel*
16 *v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). These cases emphasize the high
17 threshold necessary to justify a shoreline variance.

18 For a variance to be granted landward of the OHWM, the applicant must demonstrate that
19 the project meets *all* the criteria set forth in WAC 173-27-170. This is a high burden. In
20 situations where a proposed development meets some—or even most—of the variance criteria, a
21 variance is properly denied if it is demonstrated that one of the criteria is not met. Additionally,
only where the applicant shows that there are extraordinary circumstances and that the public

1 interest suffers no substantial detrimental effect, can a variance be granted. *Buechel*, 125 Wn.2d
2 at 203.

3 In its Motion for Summary Judgment, Ecology analyzes each of the variance criteria and
4 argues that the petitioner's application for a variance fails as a matter of law on one or more of
5 the criteria. The petitioners contend that with respect to some of the criteria, Ecology has simply
6 rendered a subjective opinion. They argue that differences in opinion over the matters such as
7 what constitutes "reasonable use" of the property amount to a factual dispute, meriting hearing.
8 Petitioners also assert that there will be no adverse impact to the shoreline environment and that
9 the project is compatible with other uses nearby.

10 [7]

11 It is settled that a non-moving party in a Summary Judgment must set forth specific facts
12 that sufficiently rebut the moving party's contentions and disclose the existence of a genuine
13 issue of material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1,13,
14 721 P.2d 1 (1986). The non-moving party may not rely on speculation or argumentative
15 assertions that unresolved factual questions remain in the case. *Id.* After review of the
16 declarations and record, the Board is convinced that, while there may be factual issues in dispute
17 regarding *some* of the variance criteria, no genuine and material factual dispute exists regarding
18 other variance criteria. And on those criteria where no material facts are in dispute, the board
19 finds that summary judgment is appropriate.

1 [8]

2 The first variance criteria requires the Board to examine whether the strict application of
3 the bulk, dimensional or performance standards set forth in the master program precludes, or
4 significantly interferes with, reasonable use of the property. WAC 173-27-170(2)(a). The
5 Nelson's interest and hobby has given rise to a large collection of memorabilia for which they
6 seek an expanded structure for additional storage. They seek to build a second story to an
7 accessory structure (a garage) that is located within the 50 foot conservancy setback area along a
8 shoreline. While the Nelsons contend that there are disputed facts regarding whether they have
9 reasonable use of the property, they have put no materially disputed facts forward. Instead, they
10 assert that Ecology should not be able to render a subjective opinion about what is or is not
11 reasonable use of property, and point to another two story garage in the vicinity as a comparable,
12 approved project. They suggest that it is necessary to actually see the corvette collection in order
13 to understand the need for a variance.

14 The Board disagrees and concludes that application of the set-back requirements to the
15 expansion of the Nelson's garage does not preclude, or significantly interfere with, reasonable
16 use of the property. Petitioners have the use of their property for a home and related accessory
17 uses, including the existing, substantial four-car garage. The Board does not pass judgment on
18 the "reasonableness" of petitioners' collection and storage of memorabilia as a desired use of the
19 property, but it does conclude that petitioners have reasonable use of the property without the
20 requested variance. This Board has previously held that what is a reasonable use is based on an
21 objective standard, not the desires of a particular applicant. *Garlick v. Whatcom County*, SHB

1 No. 95-6; (1995); *Northrup v. Klickitat County*, SHB No. 92-40 (1993). Like these earlier cases,
2 we conclude that, objectively, the existing structures provide a reasonable use for residential uses
3 and to store whatever portion of the collection will fit within them.

4 The Nelsons are presumed to know that there were limitations on development that could
5 be undertaken in the conservancy shoreline area along Puget Sound. *Buechel*, 125 Wn.2d at 209.
6 While the Nelsons understandably may wish to keep their entire collection close to home and
7 easily available to them, their situation not unlike that of property owners everywhere who
8 possess more or larger vehicles or other items than can be accommodated on their property.
9 Reasonable alternatives, such as off-site storage, are available for these circumstances.

10 It is also notable that the Nelsons do not seek a variance for any use that is water,
11 recreation, or moorage-based, distinguishing this case from those where a variance was sought
12 for such a water-related use. See, *Wriston v. Ecology*, SHB No. 05-005 (2005). Because the
13 Nelsons have failed to demonstrate that they would be denied reasonable use of their property,
14 the variance was properly denied by Ecology on this basis alone. *WAC 173-27-170(2)(a)*.

1 [9]

2 The second variance criteria is closely related to the first. Ecology correctly points out
3 that under WAC 173-27-170(2)(b), the “hardship” that petitioners may suffer is not the result of
4 the “unique condition” of the property, but rather from their own actions in collecting a large
5 amount of memorabilia that is in need of storage. Thus, the petitioners fail to demonstrate that
6 they meet the second variance criteria.

7 [10]

8 The Board also concludes that there is no factual dispute with respect to the third
9 variance criteria, compatibility of the project with other uses in the area. In response to the
10 Motion for Summary Judgment, the Nelsons submitted site plans, construction permits, and a
11 cross section of a garage built on property at Patten Lane SW, in the vicinity of their property.
12 *Declaration of Cecilia Nelson, Exhibits E, F, G.* The Nelsons argue that this is evidence that
13 their proposed garage expansion is compatible with other garages in the area. They assert that
14 there is at least one other “two story garage” in the vicinity. However, the undisputed evidence
15 is that the Nelson garage is the largest garage in the vicinity, even without the variance. David
16 Pater, the Ecology Environmental Planner, visited the site twice in 2006 and found that, “All of
17 the structures that I observed were significantly smaller than the Nelson’s garage.” *Second Pater*
18 *Declaration.*

19 More importantly, the garage located at Patten Lane, which the Nelson’s point to as a
20 comparable project, is outside the 50 foot conservancy shoreline setback, exempt from shoreline
21 permitting. *Second Pater Declaration.* The Board concludes that the Nelson project, within the

1 50 foot setback, is not compatible with other authorized uses within the relevant area. Should a
2 variance be granted, it would constitute a special privilege, as the resulting large structure is for
3 specialized storage within the conservancy setback area of Vashon Island. Therefore, the
4 petitioners have failed to demonstrate that they meet the criteria set forth in WAC 173-27-
5 170(2)(c) and (d).

6 [11]

7 In addition to not meeting several of the review criteria set forth at WAC 173-27-170(2),
8 the Board also concludes that the Nelsons have not demonstrated that there are extraordinary
9 circumstances meriting a large expansion of an accessory structure within the 50 foot
10 conservancy setback. The need for additional storage space to house a personal collection is not
11 the kind of “extraordinary circumstance relating to the physical character or configuration of
12 property” contemplated by WAC 173-27-170. Strict implementation of King County’s Shoreline
13 Master Program (SMP) will not impose unnecessary hardships on the applicants, nor will it
14 thwart the policies of the Shoreline Management Act (SMA), which seeks to preserve the natural
15 character of the shoreline, and values statewide and long-term interests over short-term and local
16 interests, among other values. *RCW 90.58.020*.

17 While the Nelsons argue that there will be no environmental harm resulting from their
18 garage expansion, the Board is mindful of the broader public interest that lies behind the SMA
19 and the county’s SMP setback requirement in the first instance. Reasonable setback
20 requirements are an accepted land use tool, and a method to balance protection of shorelines with
21 appropriate upland development. *Buechel*, 125 Wn.2d at 210. Limits on expansions within the

1 conservancy setback protect the broad underlying public interest related to the state's valuable
2 shoreline, irrespective of the specific environmental impacts (or lack thereof) of a particular
3 development project.

4 [12]

5 Ecology has also moved for summary judgment on Legal Issues Two and Three, which
6 raise the question of whether the denial of the variance permit by Ecology violated "precedential
7 procedures" and was "equitable and fair and consistent" with other decisions on Vashon Island.
8 The Nelsons argue that the garage built on Patten Lane is an example of other permitted
9 structures similar to their proposal, and to deny them the opportunity to expand is inconsistent
10 with such development, and unfair.

11 The record before the Board is that there have been no other applications for shoreline
12 variance permits received or granted in the Point Vashon community for second story additions
13 to existing garages. The Patten Lane property was not subject to shoreline permitting in the first
14 instance, as it was outside the setback area. *Second Pater Declaration*. Even if the Nelsons were
15 correct in their argument that there are garage expansions that should have been permitted and
16 were not, this does not help them. The Supreme Court noted in *Buechel*, "[T]he proper action on
17 a land use decision cannot be foreclosed because of a possible past error in another case
18 involving different property." *Buechel*, 125 Wn.2d at 211. The court rejected the argument that
19 the agency in that case had acted in an arbitrary and capricious fashion, and held that estoppel
20 elements were not present when an agency acted to enforce land use regulations even if they had
21 not been enforced in the past.

1 [13]

2 Although the existing garage on the Nelson property was approved in 2001 with a
3 shoreline variance, Ecology has noted that the original variance was granted based on a
4 misunderstanding that the structure was in a rural area subject to a 20 foot setback requirement.
5 In fact, the Nelson garage is located entirely within the 50 foot conservancy shoreline setback,
6 which limits development to protect natural resources of the shoreline. *King County Code*
7 *(KCC) 25.24.030 H; 25.24.090 B.* Within that environment, development of accessory
8 structures, such as garages, is limited by both square footage and height. *KCC 25.16.110.* The
9 Nelson proposal exceeds the KCC requirements, with a single story square footage of 1,500
10 square feet.

11 Application of these King County Code provisions to the Nelson shoreline variance
12 request, as well as the analysis above, lead the Board to conclude that the decision to deny the
13 variance in this case was fair and consistent with the law. The Board cannot conclude, given
14 these limitations on accessory structures in the conservancy environment that Ecology has acted
15 in an unfair manner, or inconsistently with other shoreline variance situations. Accordingly,
16 Ecology is granted summary judgment on Legal Issues Two and Three.

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SO ORDERED this 14th day of September 2006.

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